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No. 89-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF IDAHO,

Petitioner,

v.

LAURA LEE WRIGHT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Idaho

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

NATMAN SCHAYE*
National Association of Criminal Defense Lawyers
P.O. Box 608
Tucson, AZ 85702
(602) 743-9940

BARBARA C. SATTLER
National Association of Criminal Defense Lawyers
177 North Church, Suite 315
Tucson, AZ 85701
(602) 624-0040

**Council of Record*

43 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, Statutes and Rules:

Miscellaneous:

Witnesses: Child Comptency

STATEMENT OF INTEREST

OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than five thousand lawyers throughout the United States. NACDL was organized more than thirty years ago to promote study and research in the defense of criminal cases, as well to improve the quality and integrity of the criminal defense bar.

One of the most important objectives of NACDL is the protection of individual rights guaranteed under the laws and the Constitution of the United States. NACDL seeks to ensure that every person accused of crime receives a fair trial, and that those wrongfully accused are exonerated.

The Amicus Curiae Committee of NACDL has concluded that the issues presented in this case are so vitally important that NACDL should offer its assistance to the Court. The question presented is whether unreliable hearsay evidence in the form of a statement from a mentally incompetent person may be admitted in a criminal trial. The Court's decision may well have a profound impact on the Confrontation Clause and the rights of the criminally accused throughout the United States.

Without necessarily endorsing NACDL's position, the parties have consented to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court: Mr. James T. Jones, Attorney General of the State of Idaho, on behalf of Petitioner, and Mr. Rolf M. Kehne, on behalf of Respondent. Letters of consent are being

filed with the Clerk of this Court on the date of the filing of this brief.

SUMMARY OF ARGUMENT

I. Petitioner asserts that the Idaho Supreme Court erroneously reversed Respondent's conviction on the grounds that an out of court statement made by a mentally incompetent person which fell within no established hearsay exception violated the Confrontation Clause. Petitioner claims that the state court adopted a rigid standard requiring that three specific criteria be met before any similar hearsay statement could be admitted at trial. Petitioner urges that the appropriate test would consider the totality of the circumstances regarding such evidence.

A. Petitioner erroneously interprets the state court's decision. That court

did, in fact, apply a totality of the circumstances test. Because the issue presented to this Court misstates the ruling below, certiorari was improvidently granted and this matter should be immediately returned to the state court.

B. Petitioner urges that this Court employ the totality of the circumstances test that was, in reality, applied by the court below. While NACDL submits that this test is inappropriate in the present case, should this Court employ the totality of the circumstances standard, it would be in a position to do no more than review the factual findings of the lower court. On this independent ground, this matter should be remanded without opinion.

II.A. The hearsay declaration at issue is a statement elicited from a two and one-half year old infant who was found

to be mentally incompetent to testify at the time of trial. Her out of court statement does not fall within any established exception to the hearsay rule. The Idaho Supreme Court found that the introduction of the statement under the residual exception to the hearsay rule violated the Confrontation Clause.

Hearsay statements which fall within no recognized exception to the hearsay rule are presumed to be unreliable under the Confrontation Clause. Statements made by a mentally incompetent witness must also be presumed to be unreliable. Hearsay declarations which fall into both of the foregoing categories must therefore be deemed unreliable as a matter of law. The introduction of such evidence violates the Confrontation Clause.

B. Petitioner seeks a broad exception to the Confrontation Clause and the rules of evidence that would allow presently inadmissible hearsay statements by alleged victims in all child sexual abuse cases to be admitted. Petitioner requests a ruling that far exceeds the scope of the issue presented here, the use of hearsay statements by a non-testifying, incompetent witness.

Petitioner complains that prosecutors are unable to introduce hearsay declarations in some child sexual abuse cases under the current law. The declarations to which Petitioner refers are inadmissible because of the simple fact that they are untrustworthy and will impede the search for truth which lies at the heart of the Confrontation Clause.

C. The totality of the circumstances approach advocated by Petitioner would require trial courts to abandon the established Confrontation Clause and hearsay standards in child sexual abuse cases, and substitute an ad hoc approach. Such a system would result in inconsistent and arbitrary application of the Confrontation Clause. It would also present an exception to the hearsay rule so broad that it would endanger the fair and dependable system of justice that has been developed through the careful balancing of the government's ability to enforce the laws and the citizen's right to a fair trial based upon competent evidence.

ARGUMENT

I

CERTIORARI WAS IMPROVIDENTLY GRANTED IN THIS MATTER

At Respondent's state court trial, the prosecution was allowed to introduce hearsay statements made by a two and one-half year old child who was so immature as to be mentally incompetent to testify. Those out of court statements fell within no established exception to the hearsay rule.

On appeal, the Idaho Supreme Court reversed. After considering all of the circumstances surrounding the making of the challenged hearsay, the court ruled that the statement lacked the necessary

indicia of reliability to comply with the dictates of the Confrontation Clause. State v. Wright, 116 Idaho 382, 775 P.2d 1224, 1231 (1989).

A. Petitioner Misstates the Issue Presented by this Action.

Petitioner seeks to have this Court decide a question that is not presented by the ruling below. Petitioner claims that the state court held that hearsay statements of a small child may never be admitted unless they are: 1) tape recorded; 2) not prompted by leading questions; and 3) not elicited by an interviewer with preconceived ideas of the anticipated substance of the allegations. Brief for Petitioner ("Pet.Br."), at 41. The Idaho Supreme Court made no such ruling.

Instead, the court simply and correctly found that the hearsay statements of the incompetent child were inadmissible under any recognized hearsay exception, were unreliable, and therefore violated the Confrontation Clause. Id. at 1227, 1231.

While the court did emphasize the absence of a recording, the suggestive questioning, and the interviewer's preconceived ideas of the child's allegations, the opinion does not create a blanket requirement that those three criteria must be present in every case for such evidence to be admissible. 775 P.2d at 1227, 1230-1231.

The issue presented by Petitioner is not raised by the decision of the court below. It is therefore submitted that certiorari was granted based upon an

erroneous characterization of the Idaho Supreme Court's decision.

B. Petitioner Seeks to have this Court Function as a Trier of Fact.

In reaching its decision, the Idaho Supreme Court examined all of the facts surrounding the challenged hearsay; it did not set out a series of rigid rules which must be met to conform to the dictates of the Confrontation Clause. Id. at 1227-1231. Petitioner, misinterpreting that opinion, asks this Court to apply the same totality of the circumstances test that was applied below.

Assuming that the totality of the circumstances test is applicable to this

case[1], Petitioner is seeking to have this Court act solely as a trier of fact. The Court's only function would be to decide whether the factual findings of the lower court were correct. For this matter to involve a question of law, the Court would have to find that, no matter how suggestive the questioning and no matter how impressionable the child, resulting inculpatory allegation are invariably trustworthy.

Under this country's constitutional system of government, this Court sits to decide questions of law, not to resolve factual disputes or enact de facto legislative doctrines that exceed the scope of the issues presented by an

[1]NACDL contends that the totality of circumstances standard is not applicable to the facts presented See Argument II, infra.

individual case. Petitioner is asking the Court to assume a legislative function. No question of law is presented. A remand without decision is therefore required.

II

THE ADMISSION OF HEARSAY STATEMENTS OF A MENTALLY INCOMPETENT WITNESS THAT DO NOT FALL WITHIN AN ESTABLISHED EXCEPTION TO THE HEARSAY RULE VIOLATES THE CONFRONTATION CLAUSE

A. Presumptively Unreliable Hearsay from a Mentally Incompetent Witness Violates the Confrontation Clause.

Two undisputed truths dictate the result that must be reached in this case. First, the hearsay declarant, aged three years, one month at the time of trial, was

"incapable of receiving just impressions of the facts . . . or of relating them truly."[2] Rule 601(a), Idaho Rules of Evidence. Both the prosecutor and defense attorney agreed that she was therefore incompetent as a witness. J.A. 39.

Secondly, the infant's hearsay statement falls within no established exception to the hearsay rule. The statement therefore bears none of the indicia of reliability that accompany hearsay that falls within such an exception. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

Under these facts, the Idaho Supreme Court correctly held that the admission of

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[2]For example, after giving non-responsive answers when asked how old she was, the three year old eventually stated that she was six years of age. Joint Appendix ("J.A.") at 32-34.

the challenged evidence violated the Confrontation Clause. NACDL submits, however, that the state court erred in applying a totality of the circumstances standard. Where, as here, the declarant is so incompetent that she cannot testify, and the statements are not sufficiently reliable to fall within a recognized exception, the hearsay is so inherently suspect that its admission violates the Confrontation Clause.

The search for truth is the cornerstone of the Sixth Amendment. "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior

statement.'" Dutton v. Evans, 400 U.S. 74, 89 (1970), quoting California v. Green, 399 U.S. 149, 161 (1970).

It is difficult to conceive of hearsay less reliable than the statements of a two and one-half year old infant. Indeed, this Court recognized ninety five years ago that, "[N]o one would think of calling as a witness an infant only two or three years old . . ." Wheeler v. United States, 159 U.S. 523, 524 (1895).

Perhaps evidencing recognition of this devastating flaw in its case, Petitioner fails to address the reliability of the infant-declarant in its brief.[3] It simply defies logic and common

[3]Similarly, Amici American Professional Society on the Abuse of Children, et al., writing in support of Petitioner, discuss, at pages 12-25, of their brief, numerous studies that have focused on the mental processes of children. Virtually all of those studies were equivocal in their findings and focused on children significantly older than the declarant in this case. More importantly, it is undisputed that the declarant in issue here was correctly found to be too immature to provide meaningful testimony.

sense to contend that a statement made by an infant, then thirty months of age, could, without more, be said to provide indicia of reliability.

The courts have been virtually unanimous in their refusal to allow incompetent children to testify in civil or criminal proceedings, Note, Witnesses: Child Competency Statutes, 60 A.L.R.4th 369 (____). Obviously, the danger of misleading the trier of fact is even greater when the incompetent declarant is not seen in court, but is instead heard

through the voice of another.[4] Professor Wigmore clearly supports this principle, "If the declarant would have been disqualified to take the stand by reason of infancy, . . . his extrajudicial declarations must also be inadmissible." 5 Wigmore, Evidence, §1445 (Chadbourn rev. 1979).

For purposes of the case at issue, it is unnecessary for the Court to decide whether the rule announced by Professor Wigmore should be adopted in its entirety. Here, the Court must simply recognize that out of court statements made by incompetent witnesses are presumptively unreliable. Although there might be situations in which the circumstances

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[4]This danger is particularly great when the witness is an expert. See, e.g., State v. Roberts, 139 Ariz. 117, 677 P.2d 280, 286 (App. 1983).

surrounding a hearsay statement by such a witness would bring it within a "firmly rooted hearsay exception" that would provide "indicia of reliability", such circumstances clearly do not exist in the present case. Ohio v. Roberts, 448 U.S. at 66. Because the statement at issue here comes within no established hearsay exception, it must be presumed that the statement is unreliable. Id.

The issue before the Court is whether the purpose of the Confrontation Clause, the search for truth, will be aided by the admission of a presumptively unreliable hearsay statement elicited from an infant who cannot be relied upon to follow the witness' oath to testify truthfully. The answer to that question must be no.

B. Petitioner's Request that the Court Fashion a Code of Evidence Applicable

Only to Child Witnesses in Sexual Abuse Cases Must be Rejected.

The right of confrontation stands at the forefront of the constitutional provisions designed to advance the search for truth and to ensure that the wrongfully accused are set free. This Court has long recognized the importance of the Confrontation Clause:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243 (1895). The right to confront and cross-examine witnesses has not diminished with time, "If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version." United States v. Inadi, 475 U.S. 387, 394 (1986).

With cavalier disregard for the right of confrontation and the search for truth, Petitioner asks this Court to enact a broad exception to the Sixth Amendment, applicable to all alleged victims in child sexual abuse cases. If a "child exception" to the hearsay rule was legitimized, prosecutors would have an

incentive to present their cases through adult witnesses. The defendant's right to confront the accuser would be cast aside. The jury would be forced to make its decision without being granted the opportunity to independently evaluate the credibility of the most important witness.

By making these contentions, Petitioner again asks the Court to make rulings that far exceed the boundaries of the issues presented here. The inquiry in this case focuses solely upon the admissibility of an out of court statement made by a witness who, due to incompetency, does not testify at trial. Since many children are competent to testify by the age of four or five[5], the

[5]See, e.g., State v. Superior Court, 149 Ariz. 397, 719 P.2d 283, 287 (App. 1986) (three year old); Lindsey v. State, 465 N.E.2d 721 (Ind. 1984) (five year old); Larsen v. State, 686 P.2d 583, 586 (Wyo. 1984) (five year old); Smallwood v. State, 165 Ga. App. 473, 301 S.E.2d 670, 670-671 (1983) (four year old).

resolution of this matter will affect a limited class of cases.

In the vast majority of child sexual abuse cases, the alleged victim is able to testify, thus allowing the trier of fact to make a meaningful assessment of the witness' credibility. The Confrontation Clause issue in such cases is far different from the issue presented here, in which the declarant was neither seen by the jury nor available for cross-examination. The Court must decline Petitioner's invitation to create law to govern controversies that are fundamentally different from this litigation.

Petitioner raises a number of other arguments that are either specious[6] or bear no relation to the issues at hand. Petitioner claims that the dictates of the Confrontation Clause should be relaxed because child sexual abuse cases, particularly those that are non-violent and occur in the home, may be difficult to discover. Pet.br. 24-25. Even if this largely unsupported claim is accepted as true, it does not support a conclusion that alleged victims should be excused from testifying at trial. Petitioner cannot seriously argue that children will

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[6]Among those claims is an argument that the statement at issue here is somehow similar to a co-conspirator statement. Pet.Br. 26. In light of the fact that co-conspirator statements are spontaneous, made while the conspiracy is in progress, and fall within a well established hearsay exception, Petitioner's argument is without foundation.

somehow learn that they will not be called to the witness stand and, as a result, will reveal that they have been sexually abused.

Petitioner also seeks to chip away at the Confrontation Clause by arguing that hearsay should be admitted because some children, though intellectually capable of testifying, may be too intimidated or fearful[7] to do so. Pet.Br. 25-28. Once again, Petitioner forwards a claim that is irrelevant to this case. At no stage of the proceedings, did the state allege that the declarant could meet the competency standard, but was unable to testify because she was afraid.

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[7]Petitioner, presuming guilt in all cases, ignores the fact that the witness' fear may arise from being required to face the person who is wrongfully accused. See Coy v. Iowa, 108 S.Ct. 2798, 2802 (1988).

Should such a situation arise, there are practical and reasonable solutions far superior to substituting hearsay for live testimony. Familiarizing the child with the courtroom and the personnel, and allowing the presence of a trusted adult are likely to resolve problems of this nature. Regardless, the resolution of that predicament will have to await a case in which such a problem actually occurs.

Petitioner next complains that prosecutors are sometimes unable to introduce out of court statements made by children, citing the excited utterance and medical diagnosis exceptions[8] to the hearsay rule. Rules 803(2,4), Fed. R. Ev.

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[8]The Court has not yet ruled as to the validity of either exception under the Confrontation Clause.

Pet.Br. 30-32. Neither exception is applicable to the statement at issue here.

Simply put, if a statement by any person, child or adult, is not made in a state of excitement, the declaration does not provide the indicia of reliability upon which the exception is based. Similarly, if an individual does not recognize the importance of providing accurate information to a treating physician, the foundation for the medical diagnosis[9] exception, and its reliability,

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[9]It is interesting to note that Petitioner contends that children's statements are often inadmissible because "the child is too young to understand the doctor-patient relationship . . ." Pet.Br. 30. The Solicitor General, on the other hand, writing as Amicus in support of Petitioner, forwards the inconsistent argument that the statement at issue in the present case is reliable because it was made under circumstances resembling the "medical diagnosis" scenario. Brief for the United States, at 18-24.

are absent. The fact that out of court statements may sometimes lack the indicia of reliability that prosecutors want, does not provide a rational basis for lowering the standards of the Confrontation Clause.

Petitioner further solicits the Court to reduce the right of confrontation based upon a claim that in some child sexual abuse cases, it is difficult to obtain a conviction because the alleged victim's report is the only evidence of guilt. Pet.Br. 24-25. Petitioner offers no evidence indicating that there are fewer successful prosecutions of child sex crimes than other crimes. In fact, just the opposite may be true. Many jurors undoubtedly find it difficult to maintain their objectivity when the victim of the charged offense is a child.

More importantly, Petitioner overlooks the fact that the prosecutor's difficulty in proof may arise from the innocence of the accused. Weakening the rights of confrontation and cross-examination carries with it the danger of wrongful conviction, a danger that this Court has battled to prevent for more than two centuries.

The Court must refuse Petitioner's request that it reach far beyond the issues presented by this case to establish new constitutional rules for child sexual abuse prosecutions. In essence, the Court is being asked to reduce the prosecutor's burden in such cases by allowing the presentation of inherently suspect evidence. Such a result is in direct opposition to the search for truth which

lies at the heart of the Confrontation clause.

In the final analysis, the Court's answer to Petitioner's contentions was preordained:

> That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Coy v. Iowa, 108 S.Ct. at 2802.

C. Petitioner's Proposed "Totality of the Circumstances" Test Would Seriously Impair the Effectiveness of the Confrontation Clause.

This Court has considered the admissibility of hearsay evidence under the Confrontation Clause on numerous occasions. In each such case, The Court

has meticulously examined the applicable hearsay exception and its potential impact on the right of confrontation under the Sixth Amendment. In at least three opinions, it has been stated, "The Court has not sought to `map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay `exceptions.'" United States v. Inadi, 475 U.S. at 392, quoting Ohio v. Roberts, 448 U.S. at 64-65, quoting California v. Green, 399 U.S. at 162.

Over the past two decades, the Court has issued decisions which detail the relationship between the Confrontation Clause and two firmly established exceptions to the hearsay rule - prior

testimony[10] and co-conspirator statements[11]. Numerous exceptions that have been in existence since the birth of this nation have yet to be considered by the Court.

Petitioner is seeking to have the Court take a quantum leap far beyond "mapping out a theory". Petitioner asks that the Court take several unprecedented steps. Petitioner calls for a hearsay exception that applies only to a limited class of witnesses. This exception is only to be applied to a specified category of cases. Most disturbing, in applying this exception, the trial courts will not

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[10]Ohio v. Roberts, 448 U.S. at 66; Mancusi v. Stubbs, 408 U.S. 204 (1972); California v. Green, supra.

[11]Bourjaily v. United States, 107 S.Ct. 2775, 2782 (1987); United States v. Inadi, 475 U.S. at 393-396.

be guided by the centuries of practice and study that can be called upon to ensure fair and even application of the hearsay exceptions contained in the Federal Rules of Evidence and their state counterparts.

The adoption of Petitioner's "totality of the circumstances" plan would force trial judges to devise ad hoc rulings under the Confrontation Clause. Arbitrariness would seriously impede the search for truth. Petitioner recognizes that attempts to expand established hearsay exceptions results in the "destruction of the certainty and integrity of the exceptions." Pet.Br. 31, n.10, quoting State v. Myatt, 697 P.2d 836, 842 (Kan. 1985). The "solution" proposed by Petitioner would be far worse.

The pitfalls that such a "totality of the circumstances" approach represents

extend well beyond prosecutions for child sexual abuse. If such an approach is appropriate for children who are alleged to be victims of such crimes, why should it not apply to all juvenile witnesses? Would it not also be appropriate to extend this newly designed concept to all sexual offenses? The carefully crafted interrelationship between the Confrontation Clause and the hearsay rule, developed through decades of painstaking trial and error, would be in grave danger of extinction.

Petitioner seeks to create an illusion of symmetry, however, by suggesting that the same standard of admissibility be used in child sex cases as is applied under the residual exceptions to the hearsay rules, Rules 803(24) and 804(b)(5), Fed. R. Ev. These

exceptions cannot appropriately be used to create broad exceptions to the right of confrontation or to the rules of evidence.

The drafters of the Rules of Evidence recognized that these residual provisions should be applied "rarely, and only in exceptional circumstances." Senate Committee on Judiciary, Report on Federal Rules of Evidence, 93rd Congress, Second Session Report No. 93-1277, at 19-20 (October 18, 1974). The drafters warned that "an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules." Id. at 19.

Again, Petitioner attempts to draw the Court far beyond the bounds of the issues presented here - the admissibility

of hearsay statements made by an incompetent child and falling within no recognized exception to the hearsay rule. Dissatisfied that some out of court statements by children are unreliable and therefore cannot be admitted either under the Confrontation Clause or the rules of evidence, Petitioner asks this Court to assume a legislative function. Adoption of the evidentiary scheme proposed by Petitioner would strike a crippling blow to the search for truth in our system of criminal justice.

As parents, we fear for the safety of our children; but as a nation, we must fear even more deeply for our childrens' right to live in a society in which a citizen accused of crime receives a fair trial based upon competent evidence. We owe our children that much.

CONCLUSION

It is respectfully submitted that the Court should rule that certiorari was improvidently granted and remand this matter to the state court without further review. In the alternative, the judgement of the Idaho Supreme Court should be affirmed on the grounds that the admission of hearsay statements of a mentally incompetent witness which do not fall within any established hearsay exception violates the dictates of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Respectfully submitted,

NATMAN SCHAYE*
P.O. Box 608
Tucson, Arizona 85702
(602) 743-9940

BARBARA M. SATTLER
177 North Church Avenue

Suite 315
Tucson, Arizona 85701
For Amicus Curiae
National Association of
Criminal Defense Lawyers

*Counsel of Record

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